TABLE OF CONTENTS

Question Presented 1

Statement of the Case 1

Summary of Argument 3

Argument—

Textbook Aid to Individual Students Is Not Significant Involvement with the Beliefs or Practices of Private Schools 4

Loaned Textbooks to All Educable Children Is Not Significant State Aid to Racial Discrimination 9

Conclusion 16

Table of Authorities

CASES

Abingdon School District v. *Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963) 4

Anderson v. *Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L. Ed.2d 430 (1964) 14

Board of Education v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) 4, 6, 8

Burton v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) 12

Chance v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941) 8

Cochran v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930) 7, 16

Coffey v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969) 2, 10

Evans v. *Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) 13

Everson v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) 4, 7

Follett v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) 4

Green v. *County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) 14

Griffin v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) 10

Griffin v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969) 10

Haas v. *Independent School Dist.*, 69 S.D. 303, 9 N.W.2d 707 (1943) 8

Hall v. *St. Helena Parish School Board*, 197 F. Supp. 649 (D.C. E.D. La. 1961), affd. 368 U.S. 515 (1962) 10

Lemon v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L. Ed.2d 745 (1971) 6, 7

Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922) 15

Moose Lodge No. 107 v. *Irvis*, ... U.S. ....., 92 S.Ct. ....., 32 L.Ed.2d 627 (1972) 11-12

Norwood v. *Harrison*, 340 F. Supp. 1003 (S.D. Miss. 1972) 11

Palmer v. *Thompson*, 403 U.S. 217, 91 S.Ct. 1960, 29 L. Ed.2d 438 (1971) 12

Pierce v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) 9, 15

Poindexter v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), affd. 389 U.S. 571 (1968) 10

Reitman v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L. Ed.2d 830 (1967) 12, 13

Shelley v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 12, 13

Simkins v. *Moses H. Cone Hospital*, 4 Cir., 1963, 323 F.2d 959, cert. denied, 376 U.S. 938 (1963) 5

Smith v. *Donahue*, 202 App. Div. 656, 195 N.Y.S. 715 (1922) 8

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) 14

Tilton v. *Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L. Ed.2d 790 (1971) 5

Walz v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) 7

Wright v. *City of Brighton*, 441 F.2d 447 (5 Cir., 1971) .. 14

Wright v. *City of Emporia*, ... U.S. ....., 92 S.Ct. ....., 33 L.Ed.2d 51 14

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

First Amendment 3, 4, 5, 6, 16

Fourteenth Amendment 1, 3, 4, 6, 9, 12, 14, 16

Section 6656, Mississippi Code of 1942 ..... 1, 8

20 U.S.C. 711, 721 5

OTHER AUTHORITIES

93 A.L.R.2d 986, 987 (1964) 8

13 J. Pub. L. 76, 79 (1964) 8

43 Miss. L.J. 737 (1972) 8

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-77

DELORES NORWOOD, ET AL.,
Appellants,

vs.

D. L. HARRISON, SR., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF OF APPELLEES

QUESTION PRESENTED

Whether §6656, Miss. Code 1942, providing loans of state owned textbooks to all educable children violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Delores Norwood and other members of the appellant's class are black public school students of the Tunica County, Mississippi School District. The appellees, D. L. Harrison, et al., are members of the Mississippi State Textbook Purchasing Board. The appellants, in attendance at

the desegregated unitary Tunica County School System, brought suit to enjoin the defendants from providing or permitting the distribution or sale of state owned textbooks to private racially segregated schools and academies.

The impression created by appellant's Statement of Facts as it involves Tunica and Holmes Counties, as well as cities like Canton, Jackson, and Indianola, is that there was a *sub rosa* transmutation of public to private schools. The use of target districts is not representative of the pace or scope of the development of private schools in Mississippi. Certainly, these extreme examples are not consistent with the lower court's finding that 90% of the educable children remain in public schools.

Two other points need to be made concerning the nature of the private schools in Mississippi. All of the depositions of superintendents of the private schools disclose an "open enrollment" policy, the main criterion being ability to pay. Thus, the characterization of the schools as "private segregationist academies" [Brief of Appellants, p. 11] is not ideologically correct. The superintendents uniformly testified that their schools were formed to provide quality education. The textbook law, in their view, had nothing to do with the formation or continuation of these schools.

Second, the factual findings from *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) that the new schools were opened on the "thinnest financial basis" are stale findings of little use in resolving this present controversy. Many of the academies operate in new facilities; virtually none use former public school properties. Many of the schools were started after *Coffey* and its findings have little relevance to them.

SUMMARY OF ARGUMENT

State-furnished textbooks to all educable children in Mississippi serve a racially neutral and benevolent purpose. The degree of aid, if any, which textbook program renders private education is insignificant. Books are loaned to students at a per capita annual expense of $6.00.

The First Amendment's prohibition of "Establishment" and the Fourteenth Amendment's similar ban on discrimination are analogous limitations. State aid to pupils in sectarian schools is constitutional where that aid is to the student and not to the school per se. By the same token, the State may grant benefits without regard to race by means of free textbooks without offense to the Fourteenth Amendment.

The Court below found that the provision for textbooks was not vital to the private schools and that public integrated education was secure. These findings are not clearly erroneous however the test is framed. For the existence of a constitutional violation, there must be a partnership between private discrimination and State action that is "symbiotic." Here, private discrimination rests on private choice and not any perceptible moving hand of the State.

ARGUMENT

TEXTBOOK AID TO INDIVIDUAL STUDENTS IS NOT SIGNIFICANT INVOLVEMENT WITH THE BELIEFS OR PRACTICES OF PRIVATE SCHOOLS

For the purpose of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment. Just as a state may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abingdon School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Just as there is a line between state neutrality to religion and state support of it, there is a line drawing function in the Fourteenth Amendment cases between neutrality toward and support of discrimination. Whether government support is "institutional" aid which violates the Establishment Clause is certainly not a sufficient Fourteenth Amendment test for state action. However, identifying "institutional" support for religion or segregation certainly would point the Court toward further inquiry into the state's involvement with private discrimination.

The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

The appellant's distinctions of equal protection and Establishment Clause standards prove too much. Appellant perceives (Brief of Appellants, p. 32) that a construction grant to a religious hospital is not unconstitutional, where discrimination by such a hospital would be unconstitutional. Considered as a hypothetical, appellant's conclusion might not follow if a pure construction grant were involved with no other strings.

If the hypothetical is correct, we stress that "institutional" aid is the quality that lends truth to it, not a greater constitutional mission to stamp out discrimination. Further, it is not so much the presence of state or federal money but the ambience of public control and supervision that follows it. *Tilton* v. *Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the construction grant example, concerned a straight grant under the Higher Education Facilities Act of 1963, 20 U.S.C. 711, 721, while *Simkins* v. *Moses H. Cone Hospital,* 4 Cir., 1963, 323 F.2d 959, cert. denied, 376 U.S. 938 (1963), involved Hill-Burton funds. It was not the grant per se that caused the court to find state action in *Simkins,* but rather, the elaborate analysis of state regulation inherent in the program, exercise of a state function through the allocation of medical care, and the presence of public trustees on the boards of the hospitals.

Appellants also stress (Brief of Appellants, p. 33) that religious and secular aims of both the aid and recipient institution may be clearly delineated in First Amendment cases. They say education and segregation, on the other hand, are inextricably interwoven. This analysis assumes a compactness and neatness in the religious-secular purpose distinction that does not exist. All state aid which fuels the secular purpose of an institution has some incremental effect on the institution's ability to further re-

ARGUMENT

TEXTBOOK AID TO INDIVIDUAL STUDENTS IS NOT SIGNIFICANT INVOLVEMENT WITH THE BELIEFS OR PRACTICES OF PRIVATE SCHOOLS

For the purpose of constitutional adjudication, the contours of forbidden action under the First Amendment's establishment of religion clause should be analogous to but more stringent than standards applicable to forbidden state action under the Fourteenth Amendment. Just as a state may not foster an established religion, it may not support racial discrimination. This Court's precedents concerning state provision for assistance to pupils in sectarian schools require affirmance in this case. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Abingdon School District* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Just as there is a line between state neutrality to religion and state support of it, there is a line drawing function in the Fourteenth Amendment cases between neutrality toward and support of discrimination. Whether government support is "institutional" aid which violates the Establishment Clause is certainly not a sufficient Fourteenth Amendment test for state action. However, identifying "institutional" support for religion or segregation certainly would point the Court toward further inquiry into the state's involvement with private discrimination.

The rights protected or secured from abridgment under the First Amendment are said to occupy a preferred position. *Follett* v. *Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944).

The appellant's distinctions of equal protection and Establishment Clause standards prove too much. Appellant perceives (Brief of Appellants, p. 32) that a construction grant to a religious hospital is not unconstitutional, where discrimination by such a hospital would be unconstitutional. Considered as a hypothetical, appellant's conclusion might not follow if a pure construction grant were involved with no other strings.

If the hypothetical is correct, we stress that "institutional" aid is the quality that lends truth to it, not a greater constitutional mission to stamp out discrimination. Further, it is not so much the presence of state or federal money but the ambience of public control and supervision that follows it. *Tilton* v. *Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the construction grant example, concerned a straight grant under the Higher Education Facilities Act of 1963, 20 U.S.C. 711, 721, while *Simkins* v. *Moses H. Cone Hospital,* 4 Cir., 1963, 323 F.2d 959, cert. denied, 376 U.S. 938 (1963), involved Hill-Burton funds. It was not the grant per se that caused the court to find state action in *Simkins,* but rather, the elaborate analysis of state regulation inherent in the program, exercise of a state function through the allocation of medical care, and the presence of public trustees on the boards of the hospitals.

Appellants also stress (Brief of Appellants, p. 33) that religious and secular aims of both the aid and recipient institution may be clearly delineated in First Amendment cases. They say education and segregation, on the other hand, are inextricably interwoven. This analysis assumes a compactness and neatness in the religious-secular purpose distinction that does not exist. All state aid which fuels the secular purpose of an institution has some incremental effect on the institution's ability to further re-

ligious doctrine. There is simply no more furtherance of segregation with textbook aid than there is of a given religious doctrine in a parochial school receiving similar aid.

The state believes that this case is squarely governed by *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). There, a New York statute requiring school districts to purchase and lend textbooks to students enrolled in parochial as well as in public and private schools was under attack. This Court held the law was not in conflict with the First or Fourteenth Amendments to the Constitution of the United States. As the Court stated:

> The express purpose of §701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. *Id.* at 1065, 66.

It is likewise certain from *Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), that state aid to religious institutions which offends the

First Amendment is direct institutional aid which results in an intertwined relationship between the government and the religious authority. *Id.* at 757, "Neutral or nonideological services, facilities or materials" may be provided free of the Establishment Clause if they are given in common to all students. In striking down Pennsylvania's aid to defray teachers' salaries in church-related schools, the *Kurtzman* Court found that the aid ran afoul of the carefully preserved distinction that aid must flow to the student and not to the church-related school per se. *Id.* at 760. Nonstudent centered financial assistance has likewise been upheld for churches but only in the context where the involvement of the state is not excessive and where there is no continuing call for state surveillance or entanglement. *Walz* v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). While the tax exemption was to benefit the institution directly, it was saved by virtue of its application to all denominations and by the harshness that might be worked by taxing church property.

This Court has unerringly considered whether a given enactment has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Everson, supra*, at 838. The fact that aid may have assisted a given religious institution did not, in the cited cases, deflect this Court from considering the recipient of the aid and not the institutional by-product of that assistance. Specifically, the *Allen* Court reaffirmed *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930), holding that statewide provision for free textbooks to all students was permissible under the Fourteenth Amendment in that the state may further secular education through private schools as a proper public concern.

The theory that §6656 is a measure benefiting children rather than schools has strong basis in fact. The measure was originally sustained as one to encourage "the promotion of intellectual and moral improvement" of the citizens of the state. *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941). Neutrality in matters of private benefit was clear enough:

> It [the state] cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state . . . should not . . . proscribe him from benefits common to all." *Id.* at 710.

The accent of private benefit is consistently carried out by §6656 which provides for loans of the textbooks which the students are free to carry to their homes. In the absence of these benefits it is doubtful that the cost of books would be borne by the schools in the absence of this statute. *Note*, 43 Miss. L.J. 737 (1972).

Under this "child benefit theory" the state may extend certain welfare aid to students attending church related schools in situations where general aid to the parochial schools themselves would be unconstitutional, 13 *J. Pub. L.* 76, 79 (1964). The theory pales, however, before a finding that such aid accrues to the benefit of the schools themselves. Annot. 93 A.L.R.2d 986, 987 (1964); *Smith* v. *Donahue*, 202 App. Div. 656, 195 N.Y.S. 715 (1922); *Haas* v. *Independent School Dist.*, 69 S.D. 303, 9 N.W.2d 707 (1943). The doubt surrounding the validity of the theory was dispelled in *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The court revivified the child benefit theory by characterizing the legislation as benefiting the parent and child.

LOANED TEXTBOOKS TO ALL EDUCABLE CHILDREN IS NOT SIGNIFICANT STATE AID TO RACIAL DISCRIMINATION

This case once again calls for a formulation of the character and degree of state aid which must exist to render private action subject to the Fourteenth Amendment. Various formulations in which private-choice-state aid equation have been framed—"significant aid," "symbiotic relationship" tend to obscure inquiry into the cause-effect relationship between the state action and private action. One may find private discrimination, look for some ingredient of state action and subjectively label the result encouragement. Or, one may identify the state action, look for its actual impact on private discrimination, and determine whether it is state action or private ordering that is actually producing the result.

This case also involves an accommodation between the place public education must enjoy—as an outgrowth of the "affirmative duty" rationale—and the doctrine of private choice embodied in *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Thus, the question is broader than the constitutionality of §6656. It is whether the State may function neutrally, treating both races alike, or whether it must adopt sanctions against private education in the realm of State provided services not significant enough to motivate private discrimination. What we mean here is that State services such as police and fire protection, public health protection, driver training, and practice teachers trained in public universities may in the aggregate be a greater financial aid to private schools than books, but they would certainly not be pivotal in imposing a choice to discriminate.

This court originally broached the issue of impermissible state aid to education in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 [D.C.E.D. La. 1961], affd. 368 U.S. 515 (1962). There at issue was a tuition grant scheme with a transparent design of recasting public schools into "private" ones. There was no colorable constitutional justification in *Hall* for the closing of the schools or the mystical substitution of "private" for "public" character in the funding arrangement. Both *Hall* and *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) invalidated a total partnership between State action and private segregation, the one unavoidably leading to the other.

The tuition grant cases, *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), affd. 389 U.S. 571 (1968); *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969), all have in common the active fostering of alternatives to public education. Direct institutional aid variously adjudged to be "critical", "substantial", or "pivotal" to the new schools was, on the evidence, found to be underpinning an ever-growing network of private schools. Since these nominally private institutions were financed almost entirely from the public treasury the natural and reasonable effect of the tuition legislation was to underwrite and encourage private discrimination.

Illustrative of the approach to tuition grants is that of the Fifth Circuit. Treating Louisiana tuition grant statute Judge Wisdom articulated a two-pronged test:

> "Any aid to public schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private

> discrimination (we distinguish therefore, state aid from tax benefits, free school books, and other products of the State's traditional policy of benevolence toward charitable and educational institutions), *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833."

Both Judge Wisdom's test and his disclaimer for school books are significant in that his rationale would void "any state aid" if the purpose and effect were suspect.

The three-judge court below applied these tests and sustained the act, *Norwood* v. *Harrison*, 340 F. Supp. 1003 (S.D. Miss. 1972). It wrote that "the free textbook program began without racial motivation. . ." and had been uniformly applied, *Id.* at 1013. It found that there had been no real encouragement of discrimination in that 90% of the state's educable children remained in public schools. Finally, it discounted any notion that deprivation of the books would "roll-back" private school enrollment, *Id.* at 1013. On the issue of encouragement the court wrote:

> Plaintiffs say that furnishing the free textbooks to pupils in private schools encourages attendance at such schools. This, of course, is conjectural, as there is no substantial proof on that score. It occurs to us, however, that if encouragement alone is a sufficient test and if impermissible encouragement necessarily follows from the issuance of the books and subsequent attendance at a particular school, then the books may not be issued to those attending private sectarian schools (something which the Supreme Court has thus far declined to invalidate) *Id.* at 1013.

Appellees stress both that "encouragement" of discrimination was not found here and in fact may no longer be constitutionally sufficient. The court seems in *Moose*

Lodge No. 107 v. *Irvis*, ... U.S. ....., 92 S.Ct. ....., 32 L.Ed.2d 627 (1972) to have moved back to the affirmative enforcement of discrimination rationale of *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) rather than the subjective notion of "encouragement" of discrimination found in *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). Indeed *Moose Lodge* avoids citing *Reitman* for any "encouragement" theory, preferring to stress the "symbolic" or alter ego relationship between state action and private conduct as announced in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The relationship necessary between states and private entities to invoke the Fourteenth Amendment is one in which the State has "insinuated itself into a position of interdependence [with otherwise 'private persons'] . . . . that they must be recognized as a joint participant in the challenged activity". *Id.* at 52.

Burton's reliance on significant multiple examples of state aid in the construction of the parking facility, on the one hand, and *Moose Lodge's* insistence that there must be some demonstrable way in which state regulation or state benefits fosters racial discrimination, *Id.* at 637, 639, seems to confine the contours of the Fourteenth Amendment to private action only if there is a significant interfacing effect between private acts and state action.

Other cases decided since *Reitman* emphasize that it turned very heavily on state court findings of encouragement of discrimination. *Palmer* v. *Thompson*, 403 U.S. 217, 91 S.Ct. 1960, 29 L.Ed.2d 438 (1971) is one:

> In the first place there are no findings here about any state "encouragement" of discrimination. We need not speculate upon such a possibility for there is no such finding here, and it does not appear from the

record that there was evidence to support such a finding. *Reitman* v. *Mulkey* was based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent apartments on racial grounds. *Id.* at 444.

Similarly, *Reitman* was distinguished in *Evans* v. *Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) where the effect of a state court's termination of a discriminatory trust was in issue. A *Reitman* based argument was offered that Georgia's trust statutes, permissive on racial discrimination, induced the testator to discriminate. It was rejected since there was no evidence of such a motive. Here appellants argue from the parallelism of public to private changeovers in certain target districts. But what of the fact that 8,000 pupils in 41 schools spurn the publicly provided textbooks? Is not the fact that 25% of the private school pupils (consisting of 10% of the total of pupils) opt out of the program sufficient to support the lower court's holding of no encouragement. Certainly the fact is enough to show that textbooks are not the *sine qua non* of private education.

There is also a question of whether a neutral public policy on books works any injury on the plaintiffs. A state's neutrality toward discrimination was even sanctioned in dictum in *Reitman* v. *Mulkey*: "a state is permitted a neutral position with respect to private racial discrimination". *Id.* at 834. A state's abstention from action which would result in private discrimination was also sanctioned in *Shelley* v. *Kraemer*, 334 U.S. 1, 19, 68 S.Ct. 836, 92 L.Ed. 1161, 1183.

Does the affirmative duty doctrine have any bearing on the constitutionality of §6656? Appellants say that the constitutionality of state policy in the context of the dual

system is measured by "whether it hinders or furthers the process of school desegration." *Wright* v. *City of Emporia*, ... U.S. ....., 92 S.Ct. ....., 33 L.Ed.2d 51. Whether the keystone is effective "disestablishment," *Green* v. *County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) or "unitary", *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, 571 (1971), we cannot assume from the decisions of this court that state action which bears any relationship whatever to the interaction between public and private education must be judged by that standard. Once the duties of *Swann* and *Green* are met in the sense that the public school system is composed of just schools—neither white nor black—the affirmative duties are discharged.[2] All a state must do is maintain a preferred competitive position for public education. It should be required to steer clear of institutional aid, but should not be required to take sanctions against private education. This court should reaffirm that there is still a constitutionally viable choice between public and private education. Only where the state by its hand points toward private discrimination should the Fourteenth Amendment come into play.

Neither can §6656 be said to be a law neutral on its face but having primary impact on the minority. *Anderson* v. *Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964). In the context where all sorts of schools receive equal treatment, no right of the plaintiffs is being frustrated.

---

2. The affirmative duty extends to establishing a unitary system of public education, *Green* v. *County School Board*, *supra*, *Swann*, *supra*, but apparently does not extend to mandating centralized public education. In short, a state must undo all it has done to further a dual system in facilities, staff, etc., but must not attempt to coerce attendance in public schools. The distinction is not at variance with the school property cases, *Wright* v. *City of Brighton*, 441 F.2d 447, 5 Cir. (1971), et al., since they involve institutional aid which is a special burden on the racial minority. Here the textbook law is neutral in origin and impact.

It is private choice and not school books that is luring students from the public schools. Moreover, the plaintiff's constitutional right is one of attendance at schools, not attendance with pupils.

Assuming a constitutional right to opt out of the system, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922), the statutory provision for books at every school, antedating the entire integration controversy, would seem to work no injury on students in one system by those in another. Appellants' theory of "frustration" is simply too broad and too selective to be viable. They exempt from the prohibition private schools antedating the so-called white flight, parochial schools said not to have provided a refuge to white students and certain "other" schools (Brief of Appellants, p. 7). If injury is wrought on the plaintiffs by erosion of white attendance why does not the principle have broader reach?

Considerations of the possible relief in this case make clear the difficulty in ruling for the appellants. Determinations would have to be made as to the quantity of integration necessary for a private school to avoid a ban on textbooks. Since attendance is totally voluntary in these schools, exclusion of black pupils cannot be assumed from attendance in numbers that would be clearly insufficient in a public school. Moreover, stated "open door" policies would have to be looked into. Even though Catholic schools are exempted from the requested relief, there is a grave question whether their black enrollment would be sufficient to come out from under the requested ban. Finally, should not each school have its day in court on its enrollment policies? These obstacles to consistent and efficacious relief strongly counsel in favor of affirming the judgment of the District Court.

CONCLUSION

State furnished textbooks avoid the Fourteenth Amendment's proscriptions because they (1) are provided to children of all races, (2) serve a benevolent purpose and (3) provide a benefit to the child and not his chosen institution.

By analogy to the First Amendment Establishment Clause cases, textbook aid serves a secular function which the state may further. Based on the findings of fact that the aid does not encourage discrimination or significantly abet a private choice to discriminate, there is no Fourteenth Amendment violation. The holding of *Cochran* v. *Louisiana State Board of Education* that textbook aid is a proper public concern remains good law.

Respectfully submitted,

A. F. SUMMER, Attorney General
State of Mississippi
WILLIAM A. ALLAIN,
First Assistant Attorney General
State of Mississippi
HEBER LADNER, JR., Special Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi